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IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

ASSOCIATED INDUSTRIES OF FLORIDA, INC. and PHILIP MORRIS, INC.,

Petitioners,

v.

AGENCY FOR HEALTH CARE ADMINISTRATION, STATE OF FLORIDA DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION, AND STATE OF FLORIDA,

Respondents.

Petition for a Writ of Certiorari to the Supreme Court of Florida

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Where a State seeks to recover Medicaid expenditures paid to treat injured residents from those allegedly liable for such injuries, may the State, consistent with due process, confer upon itself a unique cause of action that directs courts to abrogate common law and equitable principles, including affirmative defenses, "to the extent necessary to ensure full recovery [by the State]?"

RULE 14.1(b) PARTIES TO THE PROCEEDING IN THE COURT WHOSE JUDGMENT IS SOUGHT TO BE REVIEWED

Appellants, Cross-Appellees

- State of Florida
- Agency for Health Care Administration
- State of Florida Department of Business and Professional Regulation

Appellees, Cross-Appellants

- Associated Industries of Florida, Inc.
- Publix Supermarkets, Inc.
- National Association of Convenience Stores, Inc.
- Philip Morris, Inc.

RULE 29.6 LISTING OF PHILIP MORRIS, INC. PARENT COMPANY AND SUBSIDIARIES

Parent Company

- Philip Morris Companies, Inc.

Philip Morris Inc. Subsidiaries

- Carolina Properties of Greenville Inc.
- Colonial Heights Packaging, Inc.
- Packaged Food & Beverage Co., Inc. and Subsidiaries
  - —Bennett, Farr & Wells Bottling Company
  - —Mitchell Citrus Products, Inc.
  - —PFB Realty Corporation
  - —Taylor Group, Inc.
- Philip Morris Overseas Limited

RULE 29.6 LISTING OF ASSOCIATED INDUSTRIES OF FLORIDA, INC. PARENT COMPANY AND SUBSIDIARIES

Parent Company

- None

(Nonwholly Owned) Subsidiaries

- None

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
RULE 14.1(b) PARTIES TO THE PROCEEDING IN THE COURT WHOSE JUDGMENT IS SOUGHT TO BE REVIEWED	ii
Rule 29.6 Listing for Philip Morris, Inc.	iii
Rule 29.6 Listing for Associated Industries of Florida, Inc.	iv
TABLE OF AUTHORITIES	vii
OPINIONS OF OTHER COURTS	1
JURISDICTION	2
CONSTITUTIONAL PROVISION INVOLVED	2
STATUTORY PROVISION INVOLVED	2
STATEMENT	3
I. BACKGROUND OF THE MEDICAID PROGRAM	3
II. THE FLORIDA MEDICAID THIRD-PARTY LIABILITY ACT	4
A. Passage of the Amendments	4
B. Description of the Amendments	5
III. THE STATE TRIAL COURT PROCEEDINGS	7
IV. THE FLORIDA SUPREME COURT DECISION	8
A. The Plurality Opinion	9
B. The Dissenting Opinion	10
REASONS FOR GRANTING THE WRIT	11

TABLE OF CONTENTS—Continued

	Page
I. THE DECISION BELOW IS OFFENSIVE TO DUE PROCESS AND CONFLICTS IN PRINCIPLE WITH PRIOR DECISIONS OF THIS COURT	11
A. Rigorous Scrutiny Rather Than Deference Applies to Review of the Florida Statute	11
B. The Statute Is Offensive to Due Process	13
II. THE DUE PROCESS QUESTION DETERMINED BELOW IS IMPORTANT BECAUSE IT CONCERNS AN ISSUE CENTRAL TO A GROWING LITIGATION MOVEMENT	17
III. THE DUE PROCESS QUESTION DETERMINED BELOW CONCERNS THE FUNDAMENTAL ISSUE OF WHETHER A STATE MAY PROMULGATE SELF-HELP LEGISLATION WHICH ARBITRARILY FAVORS THE STATE AS A LITIGANT OVER ITS LITIGATION OPPONENTS	21
CONCLUSION	22
APPENDICES	
A. Opinion of the Supreme Court of Florida	1a
B. Opinion of the Circuit Court, Leon County	44a
C. Order Denying Defendants' Motion for Summary Judgment, Case No. 94-3128 (Fla. Cir. Ct. May 23, 1995)	47a
D. Denial of Rehearing by the Supreme Court of Florida	49a
E. The Florida Medicaid Third-Party Liability Act and U.S. Const. amend. XIV, sec. 1	51a
F. Executive Order No. 95-109	70a

TABLE OF AUTHORITIES

Cases: Page

BMW of N. Am., Inc. v. *Gore*, 116 S. Ct. 1589 (1996) 14
Carter v. *Brown & Williamson, Co.*, No. 95-934 (Fla. Cir. Ct. 1996) 19
Cipollone v. *Ligget Group, Inc.*, 505 U.S. 504 (1992) 19
Duke Power Co. v. *Carolina Envtl. Study Group*, 438 U.S. 59 (1978) 15
Fein v. *Permanente Med. Group*, 474 U.S. 892 (1985) 17
Harmelin v. *Michigan*, 501 U.S. 957 (1991) 12
Honda Motor Co. v. *Oberg*, 114 S. Ct. 2331 (1994) .. 14
Martinez v. *California*, 444 U.S. 277 (1980) 15
McFarland v. *American Sugar Ref. Co.*, 241 U.S. 79 (1916) 15
New York Cent. R.R. Co. v. *White*, 243 U.S. 188 (1917) 17
PruneYard Shopping Ctr. v. *Robins*, 447 U.S. 74 (1980) 17
Speiser v. *Randall*, 357 U.S. 513 (1958) 15
United States v. *James Daniel Good Real Property*, 114 S. Ct. 492 (1993) 12
United States v. *Sioux Nation of Indians*, 448 U.S. 371 (1980) 13
United States Trust Co. v. *New Jersey*, 431 U.S. 1 (1977) 11, 12
United States v. *Winstar Corp.*, 116 S. Ct. 2432 (1996) 12
Wardius v. *Oregon*, 412 U.S. 470 (1973) 12
Western & A.R.R. v. *Henderson*, 279 U.S. 639 (1929) 15

Statutes and Regulations:

1978 Fla. Laws ch. 78-433, § 14 4
1990 Fla. Laws ch. 90-295, §§ 33, 34 4
Fla. Stat. Ann. § 409.266(3) (Supp. 1978) 4
Fla. Stat. Ann. § 409.910 (West 1996) ..... *passim*

TABLE OF AUTHORITIES—Continued

Page

Fla. Stat. Ann. § 409.910(1) (West 1996) 2, 6, 8, 10
Fla. Stat. Ann. § 409.910(6)(a) (West 1996) 5, 6
Fla. Stat. Ann. § 409.910(9) (West 1996) 7, 8
Fla. Stat. Ann. § 409.910(9)(a) (West 1996) 7, 8, 10
Fla. Stat. Ann. § 409.910(9)(b) (West 1996) 10
Fla. Stat. Ann. § 409.910(12)(h) (West 1996) 10
42 C.F.R. §§ 430.10, 433.135-154 (1995) 4
42 C.F.R. §§ 433.137(a), 433.145-46(a) (1995) 4
28 U.S.C. § 1257(a) (1994) 2
42 U.S.C. § 1396a(a)(25) (1994) 4

Constitutional Provisions:

U.S. Const. amend. XIV 15
U.S. Const. art. 1, § 10, cl. 1 11

Periodicals:

William Van Alstyne, *Denying Due Process in the Florida Courts: A Commentary on the 1994 Medicaid Third-Party Liability Act of Florida*, 46 Fla. L. Rev. 563 (1994) 16

Miscellaneous:

Fla. Exec. Order No. 95-109 (Mar. 28, 1995) 6, 18
Wall St. J., May 3, 1995, at A-5 ..... 5, 7, 8

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PETITION FOR A WRIT OF CERTIORARI

Associated Industries of Florida, Inc. ("Associated Industries") and Philip Morris, Inc. ("Philip Morris"), by their undersigned counsel, respectfully petition this Court for a writ of certiorari to review the judgment of the Supreme Court of Florida in this case.

OPINIONS OF OTHER COURTS

The Supreme Court of Florida entered an opinion and final judgment (App. 1a-43a) affirming in part and reversing in part the opinion and judgment of the Circuit Court of Leon County. (App. 44a-46a). The opinion of the Supreme Court of Florida is reported at 678 So.2d 1239. By separate order, the Supreme Court of Florida denied a petition for rehearing. (App. 49a).

JURISDICTION

The final judgment of the Supreme Court of Florida in this action for declaratory relief was entered on June 27, 1996 and petitioners' Motion for Rehearing was denied on September 6, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a) (1994).

CONSTITUTIONAL PROVISION INVOLVED

U.S. CONSTITUTION, AMENDMENT XIV

> SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATUTORY PROVISION INVOLVED

This case concerns the constitutionality of the 1994 Amendments to the Florida Medicaid Third-Party Liability Act (the "Act"). The provision most applicable to this petition is Fla. Stat. Ann. § 409.910(1) (West 1996), which provides:[1]

> It is the intent of the Legislature that Medicaid be the payer of last resort for medically necessary goods and services furnished to Medicaid recipients. All other sources of payment for medical care are primary to medical assistance provided by Medicaid. If benefits of a liable third party are available, it is the intent of the Legislature that Medicaid be repaid in full and prior to any other person, program, or entity. Medicaid is to be repaid in full from, and to

[1] The full text of the Act is included as Appendix D to this petition.

the extent of, any third-party benefits, regardless of whether a recipient is made whole or other creditors paid. *Principles of common law and equity as to assignment, lien, subrogation, comparative negligence, assumption of risk, and all other affirmative defenses normally available to a liable third party, are to be abrogated to the extent necessary to ensure full recovery by Medicaid from third-party resources*: such principles shall apply to a recipient's right to recovery against any third party, but shall not act to reduce the recovery of the agency pursuant to this section. The concept of joint and several liability applies to any recovery on the part of the agency. It is intended that if the resources of a liable third party become available at any time, the public treasury should not bear the burden of medical assistance to the extent of such resources. Common law theories of recovery shall be liberally construed to accomplish this intent.

STATEMENT

The Florida Supreme Court (by a 4-3 margin) decided that the Florida Legislature did not violate due process when it directed its courts to ignore (or "abrogate") legal and equitable rules, including affirmative defenses, "to the extent necessary to ensure full recovery" of Medicaid expenses from "liable" third parties. The constitutionality of the statute's abrogation of affirmative defenses is of particular significance, since the only preexisting "liability" of third parties turned on whether they violated duties owed to the injured Medicaid recipients.

I. BACKGROUND OF THE MEDICAID PROGRAM

Medicaid is a joint federal-state program financed primarily by the federal government. Participating states, such as the State of Florida, contribute additional funds, albeit far less than the federal government. The general purpose of the program is to provide payments for medical assistance for persons who satisfy the designated requirements (mostly income and needs related). No state

is required to participate in the Medicaid program. Those that do voluntarily participate must abide by federal requirements, one of which requires participating states to seek reimbursement for Medicaid expenditures from appropriate third parties. *See* 42 U.S.C. § 1396a(a)(25) (1994); 42 C.F.R. §§ 430.10, 433.135-154 (1995). In particular, federal law requires participating states to obtain assignment of all claims from recipients and pursue recovery from third parties by the traditional methods of subrogation and assignment. *See* 42 C.F.R. §§ 433.137(a), 433.145-46(a) (1995). Thus, federal law contemplates that a state seeking recovery of Medicaid expenditures will simply stand in the shoes of the Medicaid recipient.

II. THE FLORIDA MEDICAID THIRD-PARTY LIABILITY ACT

Pursuant to the federal requirement, the Florida Medicaid Third-Party Liability Act (the "Act") was enacted in 1978 and authorizes the State, acting through the Florida Agency for Health Care Administration ("AHCA"), to pursue recovery of Medicaid health care costs from third parties. 1978 Fla. Laws ch. 78-433, § 14. As originally enacted, the Act limited the State's remedies to the traditional subrogation or assignment action envisioned by federal law: AHCA (as assignee) simply stepped into the shoes of Medicaid recipients. Fla. Stat. Ann. § 409.266(3) (Supp. 1978). Thus, the State could obtain reimbursement from a third party for Medicaid payments if, but only if, the recipient had a right to recover from that party.[2]

A. Passage of the Amendments

The Act was substantially modified by major amendments (the "Amendments") in 1994. These Amendments

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[2] In 1990, the original subrogation provision was repealed, 1990 Fla. Laws ch. 90-295, § 34, and a new section was enacted in its place. *Id.* at § 33 (codified as amended at Fla. Stat. Ann. § 409.910). Like the federal Medicaid statute and the 1978 Act, the 1990 Act contemplated that the State's sole means of recovery against third parties would be by subrogation or assignment.

were passed as a result of a deviation from the normal legislative process during the last hours of the legislative session. Last-minute changes were slipped unannounced into an innocuous bill previously designed simply to transfer responsibility for the Medicaid fraud-control program to the Office of the Attorney General. The surreptitious changes were reportedly engineered by a group of plaintiffs' lawyers. *See* "Florida Bill Seeks to Recover State's Cost of Treating Smoking-Related Illness," Wall St. J., May 3, 1994, at A-5, 1994 WL-WSJ 294625 ("WSJ Art."). Unbeknownst to most of the Legislature, the proposed bill was thus revamped to make sweeping changes to Florida law, which are described below. The revised text was never read on the Senate floor, and the Amendments were approved by the Legislature without debate or discussion about the last minute changes.[3] After learning of the substance of what it had enacted, the Legislature overwhelmingly voted to repeal the Amendments at the beginning of its 1995 session.[4] However, the Governor vetoed the repeal.

B. Description of the Amendments

The Amendments worked a monumental change in preexisting State law. As noted, before passage of the Amendments, AHCA could pursue only traditional subrogation and assignment actions on behalf of the State. The Amendments, however, created a new "cause of action against a liable third party to recover the full amount of medical assistance provided by Medicaid." Fla. Stat. Ann. § 409.910(6)(a) (West 1996). The State's new cause of action is against "liable" third parties, and such "liabil-

[3] *See, e.g.*, Fla. S., tape recording of proceedings (April 7, 1994) (transcribed discussion is attached as Appendix 9 to Appellees' Answer and Cross-Appeal Brief before the Supreme Court of Florida ("Fla. Br.")); Fla. H.R., tape recording of proceedings (April 8, 1994) (transcribed discussion is attached as Appendix 10 to Fla. Br.).

[4] S.B. 42, 1995 Reg. Sess (Appendix 11 to Fla. Br.).

ity" for past injuries can arise only from duties owed to (and injuries sustained by) individual Medicaid recipients. The statute nonetheless declared the new cause of action to be "independent of any rights or causes of action of the recipient." *Id.* Under the 4-3 decision below, the State may now obtain third-party reimbursement of Medicaid expenses for treatment of injured recipients even when the third parties are not liable to the recipients.[5]

To weigh the scales decisively in favor of recovery by the State, the Amendments adopted a series of rules that severely limit a defendant's ability to defend against a state reimbursement lawsuit. The Amendments included:

- *Abrogation of Affirmative Defenses Only in Cases Brought by the State.* "Principles of common law and equity as to assignment, lien, subrogation, comparative negligence, assumption of risk, and all other affirmative defenses normally available to a liable third party, are to be abrogated to the extent necessary to ensure full recovery by Medicaid from third-party resources." Fla. Stat. Ann. § 409.910(1).
- *Liberal Construction of Common Law.* "Common law theories of recovery shall be liberally construed" to accomplish the "intent" of the Act (*i.e.*, that "if the resources of a liable third party become available at any time, the public treasury should not bear the burden of medical assistance to the extent of such resources"). *Id.* § 409.910(1).[6]

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[5] Subsequent to the Amendments, Governor Lawton Chiles ordered the appropriate executive branch officials to pursue the recovery of Medicaid expenditures only against the tobacco industry (and illegal drugs). Fla. Exec. Order No. 95-109 (Mar. 28, 1995) (App. 70a-72a). As noted below, this order was later held invalid, although the State has not initiated claims against any industry other than the tobacco industry.

[6] The Amendments provided that the State may bring a single, omnibus proceeding to recover from multiple third parties with

III. THE STATE TRIAL COURT PROCEEDINGS

On June 30, 1994, Associated Industries (an organization representing numerous businesses conducting business in the State of Florida), Philip Morris, Publix Supermarkets, Inc. and the National Association of Convenience Stores filed a lawsuit in State court seeking a declaration that the 1994 Amendments were unconstitutional under both the Florida and federal constitutions.[7] Count V of the Complaint alleged that the Act violated "due process guarantees against excessive and arbitrary liability." (R. 321).[8] The Complaint alleged that the Act was intended "to 'stack the deck' against the tobacco companies in future litigation brought by the State" (Complt. ¶ 16) (R. 6); that it "was drafted to eliminate the traditional common law defenses that have been successfully asserted in such product liability litigation" (*Id.* ¶ 18) (R. 6); and that the State had exempted itself from "fundamental tort defenses of Florida law available to defendants in all other tort actions." (*Id.* ¶ 28) (R. 10). The Complaint further noted that the chief legislative draftsman of the Act told the press: ' 'They're going to have to come to court, and no more of these stupid little defenses.' " (*Id.* ¶ 16) (R. 6); *see also* WSJ Art. at A-5. It noted the reaction of AHCA's general counsel to the bill: "It's like

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respect to multiple recipients if there are "common issues of fact or law." *Id.* § 409.910(9). In such actions, the evidence code was to be "liberally construed," *id.* § 409.910(9), and the State was not even required to identify the individual recipients for whom payment has been made (and with respect to which reimbursement is sought) if such identification was "impracticable." *Id.* § 409.910 (9)(a).

[7] On February 21, 1995, the State filed a claim against Philip Morris, various other tobacco manufacturers, and others associated with the tobacco industry seeking reimbursement for Medicaid expenditures under the Act. That case is set for trial in August 1997.

[8] References to "R. ——" refer to the record on appeal before the Florida Supreme Court.

counting the days 'til Christmas." (Complt. ¶ 25) (R. 9); *see also* WSJ Art. at A-5.

On June 26, 1995, the Circuit Court entered final judgment in the case. (App. 44a-46a). The Final Order was based on the agreement of all parties that there was no disputed issue of material fact and that the action was ripe for final adjudication. *Id.* The Circuit Court ruled for plaintiffs on some issues but, without elaboration, rejected the claim that the Amendments violated the federal constitution.[9] The State appealed from certain aspects of the decision on July 17, 1995 (R. 758), and plaintiffs cross appealed on July 21, 1995. (R. 765). The First District Court of Appeals certified the appeal directly to the Florida Supreme Court, which subsequently accepted jurisdiction.

IV. THE FLORIDA SUPREME COURT DECISION

In a 4-3 split decision,[10] the Florida Supreme Court affirmed the Circuit Court in part and reversed it in part. All seven justices agreed that, as enacted, the Amendments greatly expanded the State's preexisting rights and that the State's rights prior to the Amendments had been limited to assignment and subrogation. Although the dissent would have struck down the Amendments abrogating affirmative defenses on due process grounds, the four justices in the majority rejected the facial due process challenge.

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[9] The Court also rejected certain state constitutional claims but ruled that three particular provisions violated the separation of powers provision of the Florida Constitution: (1) section 409.910 (9)(a), permitting joinder and nonidentification of injured Medicaid recipients, (2) section 409.910(1), requiring the "liberal construction" of common law theories of recovery, and (3) section 409.910(9), requiring "liberal construction" of the evidence code on issues of causation and damages.

[10] In fact, only three of the seven justices joined the opinion of the Court. A fourth justice agreed with the result but wrote separately in a short, concurring opinion. 678 So.2d at 1257-58 (App. 34a).

A. The Plurality Opinion

As they had argued below, the plaintiffs argued before the State Supreme Court that the Amendments violated due process "by abolishing common law protections against arbitrary liability" and "by creating a broad institutional bias in favor of the state." Fla. Br. at 62, 64.[11] The plurality opinion's rejection of the due process challenge centered on its view that "due process is flexible and calls for such procedural protections as the particular situation demands." *Id.* at 1251 (App. 18a) (quoting *Morrissey* v. *Brewer*, 408 U.S. 471, 481 (1972)).[12] The opinion reviewed several cases that stand for the proposition that there is no absolute ban to altering common law rights and that courts generally give deference to legislative decisions. 678 So.2d at 1250 (App. 18a-20a). The opinion also recounted a series of Florida decisions (and statutes) which had altered preexisting common law rights—most of them not even discussing constitutional issues and none of them similar in operation to the Act in question. 678 So.2d at 1251-53 (App. 20a-23a). The opinion concluded that "[a]t bottom, we can find no case from the United States Supreme Court that would prohibit the Florida Legislature from abolishing affirmative defenses in the circumstances addressed by the Act." *Id.* at 1251 (App. 20a). At the end of the opinion, the plurality also opined without elaboration that the Act was "a rational response to a public need," apparently referring to the need to provide medical assistance to low income persons. *Id.* at 1257 (App. 32a).[13]

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[11] The Court also ruled that this abrogation did not violate Florida's constitutional right of access to the courts.

[12] Although the Court conceded that "any abolition of an affirmative defense must satisfy the notions of fairness dictated by our due process jurisprudence," 678 So.2d at 1251 (App. 20a), it offered no explanation of how the State's self-help legislation satisfied the standard.

[13] In addition to its federal due process ruling, the Court also reversed (by a 4-3 margin) the lower court's ruling that the Act's

B. The Dissenting Opinion

The three dissenting justices concluded that the Act was "an unconstitutional attempt to strip the tobacco companies of the defenses against smokers' claims which have been successful in the past because of the health warnings on tobacco advertising and packages." *Id.* at 1260 (App. 40a).

In particular, the dissent urged that the Amendments' abrogation of affirmative defenses for the sole benefit of the State violated due process and equal protection. The availability of defenses now hinged solely on the "completely arbitrary" fortuity that the costs of healthcare were later paid by Medicaid. *Id.* at 1259 (App. 38a). The dissent also found it significant that "[t]he State has abrogated to itself a right that no other plaintiff can claim." *Id.* at 1260 (App. 39a-40a).

The dissent starkly illustrated the arbitrariness of the statute by describing how it would work in concrete situations. These examples demonstrated that the only distinction between a successful claim by the State and an unsuccessful claim by an individual recipient that foundered on affirmative defenses was the existence of Medicaid payments. This distinction is "completely arbitrary" and "has nothing to do with the circumstances of how the illness was caused but is based only upon the fortuity that [the]

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provisions concerning joinder of claims and "liberal construction" violated state constitutional provisions on separation of powers. *Id.* at 1254-56 (App. 27a-28a). The Court also unanimously held that three aspects of the Florida statute must be modified or stricken to avoid offending the due process guarantees of the Florida Constitution. In particular, the Court struck the provisions that (1) permitted the State to pursue its newly-created action without identifying individual Medicaid recipients, Fla. Stat. Ann. § 409.910 (9) (a); (2) permitted the State simultaneously to assert joint and several liability and theories of market share liability, *id.* § 409.910 (1) & (9) (b); and (3) abolished the statute-of-repose defense, insofar as that provision revived claims which were time-barred prior to enactment of the Act, *id.* § 409.910 (12) (h). 678 So.2d at 1254-56 (App. 25a-30a).

medical bills were later covered by Medicaid." *Id.* at 1259 (App. 38a).

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW IS OFFENSIVE TO DUE PROCESS AND CONFLICTS IN PRINCIPLE WITH PRIOR DECISIONS OF THIS COURT

The statute creates the trappings of a judicial adjudication of liability, while denying defendants the essence of such an adjudication. The net effect of the Amendments is that the State of Florida's Legislature has directed its courts to ignore affirmative defenses and other established rules of common law and equity in an effort to make sure that the State will win its "lawsuit" for monetary damages. It is as though the State has declared that in football league games, when the State university team's offense is on the field, the opponent's defense must withdraw to the sidelines. Under this Court's prior decisions, such a statute, involving the self-interest of the State, is not entitled to deference but must be subject to rigorous scrutiny. This statute cannot survive such scrutiny.

A. Rigorous Scrutiny Rather Than Deference Applies to Review of the Florida Statute

This Court has applied a standard of rigorous scrutiny rather than deference in considering constitutional challenges to self-interested legislation by the states. This principle has long been recognized in the context of the Contract Clause. U.S. Const. art. 1, § 10, cl. 1. For example, in *United States Trust Co.* v. *New Jersey*, 431 U.S. 1 (1977), the Court struck down a state statute revoking a statutory bond covenant by the Port Authority of New York and New Jersey (a joint state body) not to make certain expenditures on public transport without satisfying agreed-upon financial preconditions. The Court found that deference to the legislature was less appropriate "because

the State's *self-interest is at stake*." *Id.* at 26 (emphasis added).

More recently, the Court ruled that the federal government could not avoid paying damages for breaching a contractual commitment to purchasers of federally-insured savings and loan institutions. The government had promised the purchasers that the "supervisory goodwill" associated with the purchases could be used in computing the required "reserves" under applicable banking regulations, but a subsequently enacted statute reneged on this commitment:

> If the Government is to be treated like other contractors, some line has to be drawn in situations like the one before us between regulatory legislation that is relatively free of government self-interest . . . and, on the other hand, statutes tainted by a governmental object of self-relief.

United States v. *Winstar Corp.*, 116 S. Ct. 2432, 2465 (1996).

The principle of rigorous scrutiny for self-interested legislation applies equally in other constitutional contexts. In *Harmelin* v. *Michigan*, 501 U.S. 957 (1991) (Scalia, J.), Justice Scalia noted the differential treatment between "excessive fines" and other forms of punishment under the Eighth Amendment. Unlike other punishments, "fines are a source of [state] revenue," and "it makes sense to scrutinize governmental action more closely when the State stands to benefit." *Id.* at 978 n.9. In *United States* v. *James Daniel Good Real Property*, 114 S. Ct. 492 (1993), the Court struck down a pre-hearing forfeiture of property. An "adversary hearing . . . to ensure the requisite neutrality" was "of particular importance here, where the Government ha[d] a direct pecuniary interest in the outcome of the proceeding." *Id.* at 502. In *Wardius* v. *Oregon*, 412 U.S. 470, 474 n.6 (1973), the Court struck down a state rule requiring a criminal defendant to dis-

close a notice of alibi without providing reciprocal discovery against the prosecution, noting that the Court has "been particularly suspicious of state trial rules which provide nonreciprocal benefits to the State when the lack of reciprocity interferes with the defendant's ability to secure a fair trial." *Cf. United States* v. *Sioux Nation of Indians*, 448 U.S. 371, 405 (1980) (citing *United States* v. *Klein*, 13 Wall. 128 (1872), and explaining the Court's decision in *Klein* that Congress overstepped its constitutional authority to delimit appellate court jurisdiction as based on "the fact that Congress was attempting to decide the controversy at issue in the Government's own favor").

The Amendments single out the State for favorable treatment by giving it rights to recover that are vastly superior to those enjoyed by injured recipients. The only conceivable rationale identified below for the abrogation of the defenses in favor of the State was that it helped fund the State's program of "[p]roviding medical coverage for those in need" and was thus "a rational response to a public need." 678 So.2d at 1256-57 (App. 31a-32a). The mere desire of a state to shift the responsibilities for funding state programs to third parties is an unprincipled and limitless basis for liability and falls well short of justifying the imposition of such an arbitrary rule. Such a rationale may perhaps justify the imposition of taxes to shift the costs of a state's obligations to third parties, but doing so under the pretense that the result follows from a determination of liability at trial before an impartial tribunal reeks of unfairness.

B. The Statute Is Offensive to Due Process

The essence of the Act is to strip away common law defenses based solely on the happenstance that the *State* seeks recovery and that the *State* has made Medicaid payments on behalf of a person allegedly injured by a "liable third party." A manufacturer whose product injures a privately insured party may still assert affirmative de-

fenses (even in a lawsuit by the insurance company), as may a manufacturer sued by a Medicaid recipient. Yet if the medical expenses of the person injured happen to have been paid by Medicaid *and* the *State* brings suit, these defenses are lost. The liability of a manufacturer thus turns on whether the State happens to later pay for the injured person's medical bills. This is a distinction without any principled difference; the State's direction to its courts to impose "liability" without consideration of defendants' defenses is blatant self-dealing that is wholly arbitrary and violates fundamental tenets of due process.

Given the breadth of the self-interest served by the Amendments, it is hardly surprising that there is no prior decision by this Court squarely addressing the issue raised by this petition. There are precedents from this Court, however, demonstrating that Florida's self-serving abrogation of affirmative defenses violates due process.

For example, in striking down state procedures that were inadequate to protect against the arbitrary imposition of punitive damages, the Court ruled that a state's "abrogation of a well-established common law protection against arbitrary deprivations of property raises a presumption that its procedures violate the Due Process Clause." *Honda Motor Co.* v. *Oberg,* 114 S. Ct. 2331, 2339 (1994). When states remove common law procedures providing "protection against arbitrary and inaccurate adjudication, this Court has not hesitated to find the proceedings violative of due process." *Id.* at 2340.

In another case striking down a punitive damages award on due process grounds, Justice Breyer's concurring opinion found it dispositive that state law "provided no significant constraints or protection against arbitrary results." *BMW of N. Am., Inc.* v. *Gore,* 116 S. Ct. 1589, 1605 (1996) (Breyer, J., concurring). In this case, far from protecting against such arbitrariness, the Act *ensures* arbitrariness: in effect, for no reason better than the State's wish to ensure its own success at trial, the statute simply

dismisses the obstacles to the State's recovery, including affirmative defenses that would be valid against individual recipients.

As reflected in the above punitive damages decisions, the Fourteenth Amendment's proscription against deprivation of property "without due process of law," U.S. Const. amend. XIV, plainly applies to state tort law. Although the Constitution certainly gives states leeway in fashioning common law rules of tort liability, this Court's precedents establish that due process is violated when—as here—a state does so "in an arbitrary and irrational way." *Duke Power Co.* v. *Carolina Envtl. Study Group, Inc.*, 438 U.S. 59, 83 (1978) (quoting *Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. 1, 15 (1976)); *see also Martinez* v. *California*, 444 U.S. 277, 282 (1980) (noting in the context of tort law the due process interest "in protecting the individual citizen from state action that is wholly arbitrary or irrational"). Likewise, the state may not regulate judicial procedure in a way which " 'offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.' " *Speiser* v. *Randall*, 357 U.S. 513, 523 (1958) (quoting *Snyder* v. *Massachusetts*, 291 U.S. 97, 105 (1934)).

The same principle underlies this Court's decisions regarding the constitutionality of statutory presumptions. Thus, "[a] statute creating a presumption that is arbitrary, or that operates to deny a fair opportunity to repel it, violates the due process clause." *Western & A.R.R.* v. *Henderson*, 279 U.S. 639, 642-43 (1929) (striking down presumption of negligence where "[t]he mere fact of collision between a railway train and a vehicle at a highway grade crossing furnishes no basis for any inference as to whether the accident was caused by negligence of the railway company, or of the traveler on the highway, or of both, or without fault of any one"); *McFarland* v. *American Sugar Ref. Co.*, 241 U.S. 79, 86 (1916) ("It is essential that there shall be some rational connection be-

tween the fact proved and the ultimate fact presumed, and that the inference of one fact from proof of another shall not be so unreasonable as to be a purely arbitrary mandate").

The arbitrariness here is manifest. If an allegedly injured Florida consumer brings suit against a manufacturer, no determination that the manufacturer is "liable" can be made without considering its affirmative defenses, including the consumer's personal choice to accept the risks or the consumer's own negligence. The same is true if the suit is brought by the consumer's insurer. Yet the defenses suddenly evaporate if, instead of the consumer or a private insurer, the *State* brings suit seeking reimbursement for Medicaid expenses relating to treatment of precisely the same injuries to the same consumers.

As one commentator notes, "[w]hether Florida Medicaid picks up or does not pick up the portion of [the recipient's] injuries for which [the recipient] himself was solely responsible has nothing to say to us, for there is no reason that that datum can rationally have any effect at all so to enlarge the responsibility of the [defendant] post hoc." William Van Alstyne, *Denying Due Process in the Florida Courts: A Commentary on the 1994 Medicaid Third-Party Liability Act of Florida*, 46 Fla. L. Rev. 563, 575 (1994). The only basis upon which the State even presents its claim is its payment of the injured party's medical bills. Yet, as Professor Van Alstyne writes: the State's mere dictat that " 'We paid [the recipient's] medical bill and, because we did, you must pay us . . .' is not consistent with due process of law." *Id.* at 569-70.

The dissenting justices below emphasized this fundamental point. As they put it, "[w]hether a claim is Medicaid-eligible has no more relevance in measuring whether a party may raise an affirmative defense than the question of whether [a recipient] has brown hair or blonde hair." 678 So.2d at 1259-60 (App. 38a). Making liability dependent upon the State's subsequent decision to

extend Medicaid benefits has "due process implications [which] are overwhelming." *Id.* at 1259-60 (App. 39a).

If the State had simply abrogated common law defenses generally—which it did not—even *that* action would have raised serious due process concerns (particularly if the State provided no *quid pro quo* to defendants). *See, e.g., Fein* v. *Permanente Med. Group*, 474 U.S. 892, 894-95 (1985) (White, J., dissenting from dismissal of appeal) ("[w]hether due process requires a legislatively enacted compensation scheme to be *quid pro quo* for the common-law or state-law remedy it replaces, and if so, how adequate it must be, thus appears to be an issue unresolved by this Court, and one which is dividing the appellate and highest courts of several states"); *PruneYard Shopping Ctr.* v. *Robins*, 447 U.S. 74, 93-94 (1980) (Marshall, J., concurring); *New York Cent. R.R. Co. v. White*, 243 U.S. 188, 201 (1917). But the evil here far exceeds such a neutral change in the common law; the Amendments are special interest legislation abrogating the defenses *for the exclusive benefit of the State.* As the dissent observed below: "how can it be that *only* when the State makes a claim, there can be no affirmative defenses? The State has arrogated to itself a right that no other plaintiff can claim." 678 So.2d at 1260 (App. 39a-40a).

II. THE DUE PROCESS QUESTION DETERMINED BELOW IS IMPORTANT BECAUSE IT CONCERNS AN ISSUE CENTRAL TO A GROWING LITIGATION MOVEMENT

As noted above, even if viewed in isolation, the Florida Supreme Court's decision merits review by this Court. The context in which this lawsuit arises, however, underscores the urgent need for review. As shown below, the Amendments are a classic example of bad law adopted to attack a group of unpopular defendants.

The Florida Act, on its face, applies to all industries, and neither the statute nor the applicable legal principles can be limited to a particular industry. However, it is

common knowledge (and indeed was argued by the State below)[14] that the statute is targeted at the tobacco industry. Indeed, the sole recovery action under the statute to date is an omnibus lawsuit pending against various tobacco defendants in which Florida seeks to recoup vast amounts of Medicaid expenditures.[15]

The Court can take judicial notice that the tobacco industry today is, to say the least, unpopular with certain segments of public opinion and certain government officials. Although such unpopularity should not in and of itself either detract from or add to the legal rights of companies involved in the tobacco business, the sad fact is that unpopular groups or individuals have often been the target of unconstitutional activity. It cannot seriously be questioned that tobacco companies, as unpopular as they may be in some quarters, are entitled to due process and protection from arbitrary state action. Fortunately, this Court is particularly vigilant to protect the constitutional rights of such unpopular groups. Indeed, such protection is critical when—as here—legislatures and courts make broad changes to laws of general application under cover of the unpopularity of a particular defendant or group of defendants.

The Florida Act is best evaluated in the context of a broad-based litigation movement against an unpopular group of defendants that is now sweeping the nation.

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[14] R. 322-23 & n.1.

[15] In fact, Governor Lawton Chiles of Florida signed an executive order directing state authorities to refrain from enforcing the law "against any defendants other than those responsible for disease and death caused by tobacco produces and those responsible for disease and death caused by the sale and consumption of illegal drugs." Fla. Exec. Order No. 95-109 (March 28, 1995) (App. 72a). The Circuit Court for Leon County found that the Governor lacked authority to limit a legislative enactment by executive order and thus denied the State's motion for summary judgment against the non-tobacco plaintiffs below. (R. 476-77) (App. 47a). Nevertheless, the State has expressed no intention of enforcing the law beyond the industries identified in the executive order.

Placing this movement—and the Florida Act—in perspective requires a brief review of the history of smoking and health litigation over the past 40 years.

Lawsuits by Individuals. Over the last few decades, numerous products liability lawsuits by individual smokers seeking to recover damages for injuries allegedly caused by cigarette smoking have been filed in the state and federal courts. To date, such lawsuits have been almost uniformly rejected by both judges and juries. Many of the lawsuits have been resolved based on affirmative defenses (such as assumption of the risk or contributory negligence). One leading case—decided four years ago by this Court—is *Cipollone* v. *Ligget Group, Inc.*, 505 U.S. 504 (1992), in which the Court found that the Federal Cigarette Labeling and Advertising Act, as amended in 1969, preempted certain common law claims due to the mandated warning labels on cigarette packages.

Since the decision in *Cipollone,* numerous other individual lawsuits have been filed. In fact, over 200 such lawsuits are currently pending in the state and federal courts. To date, only one case—which is still subject to appeal—has resulted in a judgment awarding damages against a cigarette manufacturer. *Carter* v. *Brown & Williamson, Co.*, No. 95-934 (Fla. Cir. Ct. 1996). Thus, the overwhelming consensus of the decided cases is that plaintiffs may not excuse themselves from responsibility for their own choices by suing tobacco manufacturers. That, of course, is one of the principal defenses to which the State's chief legislative draftsman referred when he said that "they're going to have have to come to court, and no more of these stupid little defenses." (Complt. ¶ 16) (R. 6).

The States Bring Suit: The Medicaid Reimbursement Movement. Certain state attorneys general, supported by a network of private attorneys, have initiated a movement to seek massive damages against the tobacco companies as "reimbursement" for medical expenditures made by the states on behalf of the asserted victims of tobacco. Primarily, these lawsuits seek recovery of amounts paid by

states on behalf of Medicaid beneficiaries. The first such lawsuit was initiated by the Attorney General of Mississippi in May 1994, and 20 such lawsuits are currently pending in state and federal courts throughout the country.[16] In addition, similar lawsuits have been filed by a number of local governments, including the city of New York and the counties of Los Angeles and San Francisco.

Central to all these Medicaid reimbursement lawsuits against tobacco defendants is an attempt to circumvent the causation issues and affirmative defenses that have been dispositive of the claims of individual plaintiffs in tobacco litigation over the past forty years. Florida has attempted to achieve this through legislative fiat. Other states also attempt, one way or another, to avoid proof of individual injury and affirmative defenses through pursuit of novel claims of unjust enrichment, restitution, indemnity, public nuisance, and the like. The lawsuits all seek recovery for Medicaid expenditures without proof that a single individual recipient has a claim against any defendant, and they seek to preclude defendants from asserting traditional common law defenses.

While Philip Morris believes that the various state attorneys general have determined to target these cases against the manufacturers of tobacco products, there is nothing in the Florida statute—or in the novel common law or equitable theories pursued by other states—that could preclude additional lawsuits against manufacturers of any or all other products (*i.e.*, automobiles, liquor, pharmaceuticals, handguns, or any other product that al-

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[16] In addition to Florida and Mississippi, the states in which Medicaid reimbursement lawsuits are pending include the following: Alabama, Arizona, Connecticut, Kansas, Illinois, Iowa, Louisiana, Maryland, Massachusetts, Michigan, Minnesota, Oklahoma, Ohio, New Jersey, Texas, Utah, Washington, and West Virginia.

No Medicaid reimbursement lawsuit has been tried to date. Trials are scheduled in three of the cases, including Florida's, in 1997.

legedly injures persons covered by Medicaid). Given the size and extent of the federal Medicaid program, the issues presented by this petition are highly significant to the nation's welfare and economy.

III. THE DUE PROCESS QUESTION DETERMINED BELOW CONCERNS THE FUNDAMENTAL ISSUE OF WHETHER A STATE MAY PROMULGATE SELF-HELP LEGISLATION WHICH UNIQUELY AND ARBITRARILY FAVORS THE STATE AS A LITIGANT OVER ITS LITIGATION OPPONENTS

The federal issues involved here merit this Court's attention even if the Court considers solely the impact of the Florida Supreme Court's ruling on Medicaid reimbursement lawsuits. Yet the legal issue resolved by the Florida court has important ramifications well *beyond* the context of tobacco litigation. If allowed to stand, the opinion below supports the apparently limitless proposition that any state—as an individual litigant seeking to recover damages for itself from private parties—may fashion special rules of liability applicable solely to itself and designed to ensure that the state prevails in the courtroom when others could not. Permitting legislatures to enact self-help remedies designed to ensure the victory of the state in court is bound to spawn frequent abuses of due process and individual rights.

CONCLUSION

This petition for a writ of certiorari should be granted.

Respectfully submitted,

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